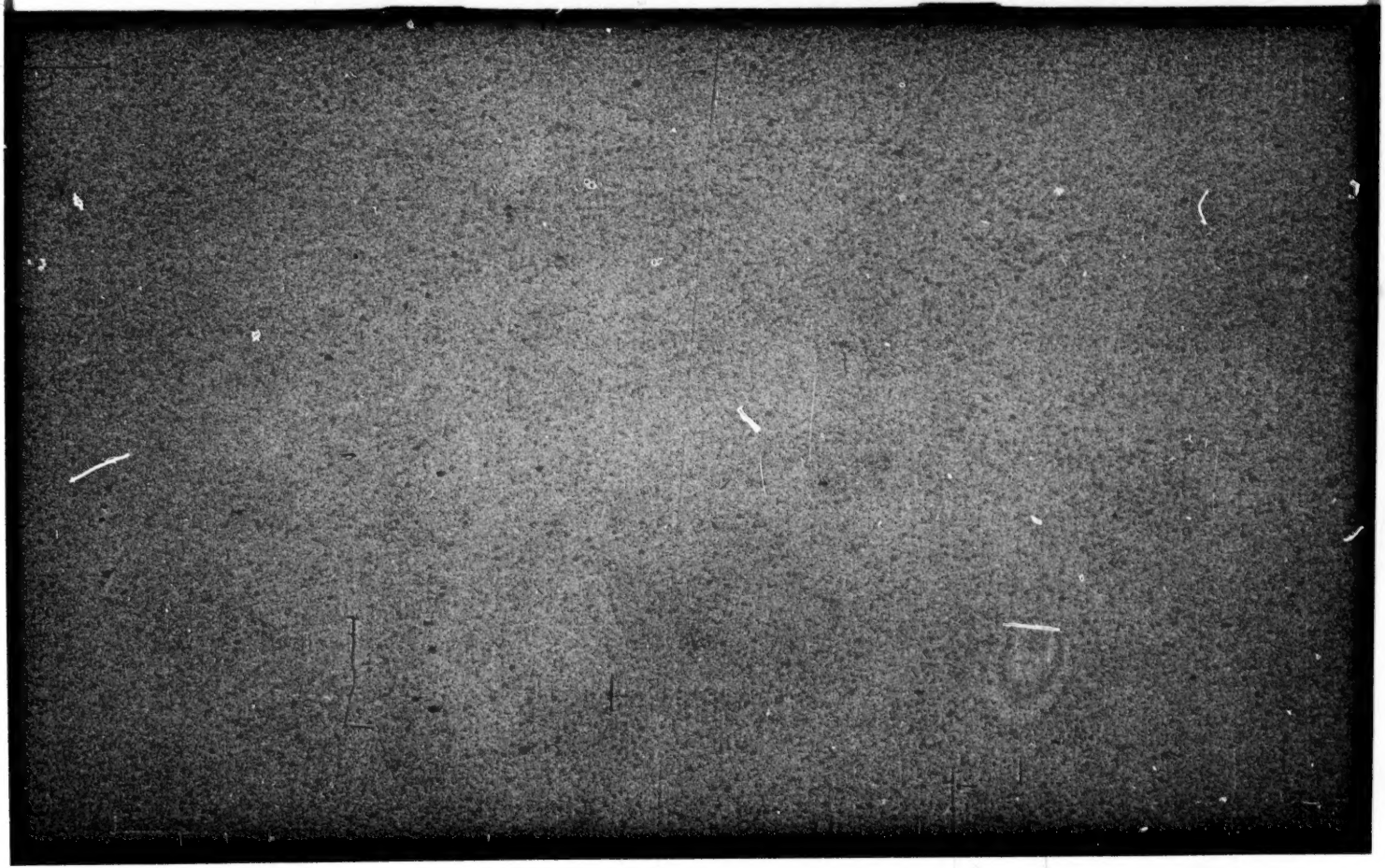

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. [redacted]

NORVAL GOSS, *et al.*,

Appellants,

—v.—

EILEEN LOPEZ, *et al.*,

Appellees.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus*

The American Civil Liberties Union is a nationwide nonpartisan organization dedicated to preservation of the liberties safeguarded by the Bill of Rights. It files this brief with the consent of the parties.

In recent years, the rights of public school students have been a major focus of the Union's concern.[1] Reflecting that

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[1] For the past several years, the New York Civil Liberties Union has maintained a Student Rights Project, which has sought to establish and protect the rights of students in the New York City public schools. See generally, *NYCLU Student Rights Project: Report on the First Two Years, 1970-1972,* ERIC Document No. ED 073 524.

concern, the Union urged this Court in *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969), to extend to students the free speech protections of the First Amendment. Five years later, we ask this Court to reaffirm its holding in *Tinker* that students are " 'persons' under our Constitution" and insure to them the procedural fairness which is the necessary condition of full enjoyment of substantive rights.

The interest which we advance in this case was perhaps best summarized by Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 171-72 (1951) (concurring opinion).

> "No better instrument has been derived for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling so important to a popular government that justice has been done."

Statement of the Case

This case involves a constitutional challenge to an Ohio statute and school district regulations which permit public school students to be suspended from school for 10 days without a hearing. Appellees, and the class they represent, are public school students who were suspended pursuant to the authority of the challenged statute and regulations.

A three-judge district court, in an unreported opinion, declared the statute unconstitutional as a violation of the due process clause of the Fourteenth Amendment, and ordered the records of appellees' suspensions expunged.

ARGUMENT

Introduction

It is a fundamental principle of our system of government that, before being deprived of an interest protected by law, a person must be given "an opportunity to be heard respecting the justice of the judgment sought." *Hagar* v. *Reclamation District,* 111 U.S. 701, 708 (1884). The application of that principle to school affairs is important not only because the state is obliged to use fair procedures in dealing with all its citizens, but because schools "are educating the young for citizenship." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 637 (1943). The effect of "sporadic and discretionary enforcement of unreasonable regulations," as one circuit court has observed, "is more likely to breed contempt of the law than respect for and obedience to it." *Jackson* v. *Godwin,* 400 F.2d 529, 535 (5th Cir. 1968). The court was speaking of the effect upon prisoners of arbitrary discipline procedures, but the lesson for this case is apparent. At issue here is whether schools will be permitted "sporadic and discretionary enforcement" of their rules. At stake may be whether students will enter society with respect or contempt for the law.

Students Are Entitled to a Fair Opportunity to Be Heard Before They Can Be Deprived of Their Right to Attend School

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protections of libery and property." *Board of Regents* v. *Roth,* 408 U.S. 564, 569 (1972). The

interest which invokes due process protections may derive from the Constitution or state law, may be denominated a right or a privilege, or may be categorized as liberty or property. Whatever its source, whatever its label, if the deprivation is "significant," due process protections attach. *Boddie* v. *Connecticut,* 401 U.S. 371 (1971). Education, by the unanimous agreement of the lower federal courts, is such an interest.[2]

The open question, then, is not whether or not education is an interest whose deprivation must be preceded by due process. Rather, the question is how much due process must accompany how much deprivation. Or, put another way, some due process is commanded by "the nature of the interest at stake," *Board of Regents* v. *Roth, supra,* 408 U.S. at 571; what will vary in the particular situation is "the form of hearing required," *id.* at 570.

Deprivations of education, ranging from suspensions of varying lengths to permanent expulsion, are a routine form of punishment in the schools. Appellant school authorities, however, prefer to speak euphemistically of "acting to preserve order and discipline" (Brief of Appellants, p. 21), hinting that they are engaged not in punishment but in an educational function with which the courts should not become involved. Regardless, discipline—such as suspension from school—is imposed upon students who are accused of failing to obey the rules, thus requiring a finding that a rule has been broken and that the accused student is culpable. That fact-finding process must be procedurally fair if the result—whether called discipline or punishment—is the deprivation of a protected interest.

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[2] See, for example, cases cited in the opinion of the court below. See also, Levine, Divoky and Cary, *The Rights of Students,* Ch. IV (1973).

The "formality and procedural requisites," *Boddie* v. *Connecticut, supra,* 401 U.S. at 378, of the fact-finding process may vary in accordance with the extent of deprivation, but what is essential is that the hearing be held "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). Naturally, the most meaningful time for a hearing which will determine the propriety of punishment is prior to its imposition. That fundamental principle of due process, which this Court has called its "root requirement," is generally applicable "except for extraordinary situations. . . ." *Boddie* v. *Connecticut, supra,* 401 U.S. at 379. With the exception of such extraordinary situations,[3] elemental fairness demands that a hearing precede suspension from school.

Appellants suggest that this analysis is inapplicable because no "grievous loss," *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), justifying due process protections, was suffered by the suspended students. They point in particular to the fact that the students' academic careers seemingly did not suffer.

Several answers suggest themselves. First, plaintiffs sought and obtained a declaratory judgment against a statute which may be applied to many other students, some of whom will presumably suffer more substantial academic consequences than did appellants. Second, as the court

[3] One district court suggested that such a situation might arise "when the misconduct is so gross and the atmosphere of the school so tense that substantial disruption is highly probable unless instant expulsion is effected." *Fielder* v. *Board of Education,* 346 F. Supp. 722, 729 (D. Neb. 1972). However, even such limited departures "from the accepted standards of due process [are] capable of grave abuses," *In re Oliver,* 333 U.S. 257, 274 (1948), and should be narrowly limited.

below noted, there are other consequences, psychological and social, which a suspended student suffers.[4] Third, the permanent entry on a student's record of a suspension may adversely affect future educational and career opportunities.[5] Finally, to miss ten days of instruction is itself a significant deprivation. Ohio, like most other states, has enacted laws which compel school attendance and punish truancy, presumptive evidence of a judgment that daily classroom instruction is valuable. If a child's daily attendance at school is so important that it will be compelled by law, surely the state will not now be heard to characterize a 10-day prohibition against attendance as of only minor consequence.

The state tries to avoid the harsh realities of a suspension by claiming that it is an aspect of "management and control of the internal affairs of a system it had established" (Brief of Appellants, p. 21). The theme is a familiar one. Institutions have always opposed procedural safeguards on the grounds that they interfere with "internal affairs." Thus, with little variation on the theme, due process claims have been resisted by, among others, those

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[4] As one district judge has observed, "suspension is a particularly humiliating punishment evoking images of the public penitent of medieval Christendom and colonial Massachusetts, the outlaw of the American West and the ostracized citizen of classical Athens. Suspension is an officially sanctioned judgment that a student be for some period removed beyond the pale." *Sullivan* v. *Houston Independent School District*, 333 F. Supp. 1149, 1172, *rev'd on other grounds*, 475 F.2d 1071 (1973), cert. denied —— U.S. —— (1973). Compare Justice Brennan's observation in *Abington School District* v. *Schempp*, 374 U.S. 203, 292 (1963) (concurring): " . . . the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult. . . . "

[5] Compare *Street* v. *New York*, 394 U.S. 576, 579 n. 3 (1969) (collateral consequences of a criminal conviction).

in charge of colleges, *Dixon* v. *Alabama State Board of Education,* 294 F.2d 150 (5th Cir. 1961); welfare benefits, *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); juvenile courts, *In re Gault,* 387 U.S. 1 (1967); parole, *Morrissey* v. *Brewer,* 408 U.S. 471 (1972); public housing, *Escalera* v. *New York Housing Authority,* 425 F.2d 853 (2d Cir. 1970); and prisons, *Sostre* v. *McGinnis,* 442 F.2d 178 (2d Cir. 1971); *Nolan* v. *Scafati,* 430 F.2d 548 (1st Cir. 1970); *Landman* v. *Royster,* 333 F. Supp. 621 (E.D. Va. 1971).

The arguments made on behalf of those institutions warn of similar consequences: cumbersome procedures will drastically impair the efficiency of the institution. But procedural guarantees are now afforded by each of those institutions, and they continue to function—perhaps even better; certainly more fairly.

The schools too will survive if suspension procedures are required to be fair, and not merely efficient. Insofar as the state is genuinely concerned with emergency situations, the due process principles discussed above permit them to remove a student temporarily "if the school is in the throes of a violent upheaval," provided a hearing is held at the "earliest opportunity." *Pervis* v. *La Marque Independent School District,* 466 F.2d 1054, 1058 (5th Cir. 1972). Thus, there is no interference with the state's ability to respond to genuine threats to its educational function.

If the concern of school officials is with the burdens of formal proceedings, they have it in their power, in accordance with the principle that the nature of the hearing will "vary depending upon the circumstances of the particular case," *Dixon* v. *Alabama State Board of Education, supra,* 294 F.2d at 158, to minimize those burdens. If they wish to afford less formal procedures, they can simply curtail

the extent of deprivation suffered by the suspended student. Thus, the period of the suspension could be limited to the duration of the emergency, alternative instruction in some form could be provided,[6] make-up work could be offered and academic penalties and permanent records eliminated.[7] In so doing, the state would be exercising "the least possible power adequate to the end proposed." *Anderson* v. *Dunn,* 6 Wheat (U.S.) 204 (1821).

Another way for the state to reduce the burdens of giving suspended students due process is to substantially limit the number of situations in which suspensions are permitted. When school officials permit suspension for violation of *any* school rule or regulation, as do appellees, it is apparent that students may be suspended for conduct which presents no conceivable threat to educational activities. If procedural requirements for such suspensions proved too burdensome, the state might well explore alternative means of dealing with that conduct and limit the suspension power to emergency situations.[8]

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[6] One federal court has required that "alternative educational opportunities" be provided for suspended students. *Mills* v. *Board of Education of the District of Columbia,* 348 F. Supp. 866 (D. D.C. 1972). See also, New York City Board of Education By-Laws, section 90, subdivision 42 (App., *infra,* p. 19): "Plans shall be made to provide the maximum educational experience for the [suspended] student."

[7] The fact that all suspensions, of whatever duration, become a permanent entry in a student's record, argues for due process guarantees regardless of the length of the suspension. It is the permanent record of the suspension which is perhaps the most disabling of its features. See, *e.g., Vail* v. *Board of Education of Portsmouth School District,* 354 F. Supp. 592, 603 n.4 (D.N.H. 1973).

[8] The by-law of the New York City Board of Education, section 90, subdivision 42 (App., *infra,* p. 19) is illustrative. It calls suspensions an "emergency power," and it allows suspensions only when the student's behavior "prevents the orderly operation

If the state does not choose to forego use of the suspension power in non-emergency situations, it can make no claim that application of due process principles to student suspensions will diminish its power to safeguard its interests. As one commentator has observed,

> "the institutionalized control which schools impose on students often not only fails to serve an educational purpose but in principle does the opposite . . . . In an effective educational setting most of the objectionable behavior of students—their idiosyncratic tendencies, their expressions of opinions on many subjects, the disturbances and distractions caused by their actions, their statements and even their appearance—is actually grist for the educational mill." Ladd, "Allegedly Disruptive Student Behavior and the Legal Authority of School Officials," 19 *J. Pub. L.* 209, 236 (1970).

We think the state has substantially exaggerated the adverse consequences which would flow from due process suspension hearings. It is, in this regard, worth noting that many of the largest school districts in the country, including New York City,[9] San Francisco, Philadelphia and

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of the class or other school activities or presents a clear and present danger of physical injury to school personnel or students." In addition, the suspension must be reviewed every day by the principal and may last only as long as the emergency lasts.

[9] The New York City Board of Education has expressed its commitment to due process in these terms:

> "The constitutional guarantees for students do not stop at the school house door and must be assiduously protected for all who enter. Likewise, a student, like all others in this society, is presumed to be innocent of charges until proved guilty by the evidence produced, surfaced and proved in a fair and impartial hearing, whether administrative or judicial." *Matter of Castelli,* New York City Board of Education (May 29, 1970).

Seattle, have adopted elaborate procedural safeguards in connection with student suspensions. In addition, the Commissioners of Education in New York and New Jersey, the highest education officials in those states, have required due process protections in student suspension hearings.[10]

We might be inclined to agree with Mr. Justice Black, dissenting in *Tinker*, that the federal courts should not be in the business of running the approximately 23,000 school districts throughout the country. That hardly means that everything school officials do in the name of education is beyond judicial scrutiny. *Barnette* v. *West Virginia State Board of Education, supra.* School officials have an important and valuable social role to perform, and surely intend to do nothing but good.[11] Nevertheless, this Court's caution of several years ago is worth recalling: "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *In re Gault*, 387 U.S. 1, 18 (1967).

We are not unmindful of the feeling, shared by many, that our schools are a particularly unlikely place for the imposition of due process guarantees. Parents, students, teachers, and administrators understandably prefer to see themselves as involved in a common effort rather than as adversaries in formal proceedings. But when a student is accused of misconduct, *and* the school officials seek to suspend him, they are adversaries, a fact not changed by foregoing a due process hearing. We emphasize the fact of suspension as critical to the adversary relationship because

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[10] *Matter of Rose*, 10 Ed. Dept. Rep. 4 (1970); *Scher* v. *Board of Education of West Orange*, 1969 School Law Dec. 92.

[11] For a discussion of the doctrine of *in loco parentis*, see Buss, "Procedural Due Process for School Discipline: Probing the Constitutional Outline," 119 *U. Pa. L. Rev.* 545, 559-62 (1971).

there is nothing in the due process clause that prevents school officials from utilizing procedures which deal with misconduct non-punitively.[12] Nothing we have said need limit or formalize those procedures. When, however, the school responds by suspending a student and depriving him of education, it becomes his adversary as surely as if it sought to put him in jail, evict him from public housing, or terminate his welfare benefits.[13] Given this Court's recognition of the critical role of education in our society, its impact on his future life may even be more severe. Such consequences should not be visited without procedural regularity.

In *Tinker,* this Court spoke of the "sort of hazardous freedom . . . that is the basis of our national strength. . . ." An important aspect of that "hazardous freedom" is due process of law. Like free speech, it carries some risks; it

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[12] In New York City, for example, the Circular (App., *infra,* pp. 15-18) governing pupil suspensions suggests the following procedures:

> "All possible alternatives should be explored to help children resolve their adjustment problems before suspension is considered. In pursuit of this objective the school will assume the responsibility to refer pupils and their parents for specialized help. . . ."
>
> "Each principal and teacher has a responsibility to identify pupils in need of help and to enlist the aid of the Board of Education's pupil personnel services as well as the resources available in the community. . . ."
>
> "When a serious problem arises regarding a pupil's behavior, a presuspension conference attended by the appropriate personnel should be called at an early stage in an effort to resolve the problem. It is expected that the parent will be included in efforts to help the pupil in school adjustment."

[13] "When a school board undertakes to expel a public school student, it is undertaking to apply the terrible organized force of the state, just as surely as it is applied by the police, the courts, the prison warden or the militia." *Breen* v. *Kahl,* 296 F. Supp. 702 (W.D. Wis.) *aff'd,* 419 F.2d 1034 (7th Cir. 1969).

also forms part of "the basis of our national strength." It is indisputably a fundamental part of our heritage. As Justice Brandeis observed, "in the development of our liberty, insistence upon procedural regularity has been a large factor." *Burdeau* v. *McDowell,* 256 U.S. 465, 477 (1921) (dissenting).

Regrettably, the perception by most public school students appears to be that "procedural regularity" is a concept that has little reality for them in the day-to-day operation of their schools. A recent study funded by the United States Office of Education, the summary report of which was entitled *Civic Education in a Crisis Age* (1970),[14] concluded that

> ". . . a large majority of the students feel they are regularly subjected to undemocratic decisions. These are seen as unilateral actions by teachers and administrators that deny fundamental rights of persons to equality, dissent, or due process . . .
>
> . . . the great majority of students in secondary schools —'the supposedly silent majority'—is becoming increasingly frustrated and alienated by school. They do not believe that they receive individual justice or enjoy the right to dissent, or share in critical rule-making that affects their lives.
>
> If this is true, then our schools may be turning out millions of students who are not forming a strong and reasoned allegiance to a democratic political system, because they receive no meaningful experience with such a democratically-oriented system in their daily

[14] The study was performed by the Center for Research and Education in American Liberties of Columbia University and Teachers College.

lives in school. For them we should remember, public school is the governmental institution which represents the adult society in its most direct and controlling aspect. If we do not teach the viability of democratic modes of conflict-resolution, and win respect for these as just and effective processes, we will lose more and more potential democrats. If we mean to alter this, we had better look with painful attention at what our children are saying about their perceptions of schools, for it is these perceptions, and not our wishful thinking about what schools should or might be, that are fundamental in the citizenship education now taking place in American secondary education." *Id.* at 1-2.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

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